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Supreme Court of the United States

October Term, 1962

No. 266

ALI MONEM,

Petitioner,

against

COSMOPOLITAN SHIPPING CO. INC., HILLCONE STEAMSHIP CO. INC. and MARITIME TRANSPORTATION COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

JACOB RASSNER,
Attorney for Petitioner,
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New York City.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

The petitioner prays that a writ of certiorari issue to the Municipal Court of the City of New York, Borough of Manhattan, First District, to review the judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on June 15, 1961.

Jurisdiction

This action was originally commenced in the Municipal Court of the City of New York, Borough of Manhattan, First District to recover maintenance and cure benefits due petitioner from the defendants. A trial was had before a Justice of the Court without a jury. Judgment was rendered in favor of the defendants without opinion and entered on February 7, 1961. The Municipal Court aforementioned is presently in possession of the record in this matter.

The Appellate Term of the Supreme Court of the State of New York, First Department, affirmed the aforementioned judgment by order and judgment entered on June 15, 1961, without opinion. The Appellate Term was the only Appellate Court to review the decision of the Municipal Court and review of this judgment is sought.

Leave was thereafter requested to appeal to the Appellate Division of the State of New York, which was denied by order of the Appellate Term, entered July 27, 1961, and subsequently by order of the Appellate Division, entered October 24, 1961.

Petitioner then moved for leave to appeal to the Court of Appeals of the State of New York, which was denied by order of the Appellate Division entered December 14, 1961, and by order of the Court of Appeals, dated April 26, 1962.

The petitioner has exhausted all remedies available to him under the laws of the State of New York. No opinion has been rendered by any of the Courts below. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

As this action was brought by a seaman, it is respectfully requested that this petition be filed without prepayment of fees, pursuant to 28 U. S. C. A. § 1916.

Question Presented

Is a seaman who suffers injury on board a vessel, and, following a period of disability, is considered fit for duty by the United States Public Health Service although he may not have reached the maximum benefits to be obtained from medical care and treatment, and who returns to sea to earn his livelihood, forever precluded from receiving any future maintenance benefits from the owner of the vessel on which he was injured if he is subsequently determined to be unfit for duty by the United States Public Health Service because of the original injury?

Statement of the Case

This action was brought by a merchant seaman to recover maintenance and cure benefits.

It is undisputed that while petitioner was employed by the respondent on board the S.S. CORNELL, on April 4, 1957, he suffered an injury.

Upon discharge from the vessel, petitioner was considered not fit for duty by the United States Public Health Service Hospital and was paid his maintenance by the respondent until January 6, 1958. However, he continued with his treatment and was considered fit for duty on May 2, 1958, at which time he was told to return after one trip (Appendix, p. 7). He then continued treatment intermittently for the injuries suffered on board the S.S. CORNELL (as well as other conditions) until July 28, 1960, at which time the following entry was made on the record:

> "Surgical Clinic 7/28/60. Still has complaints of decreased sensation and increased pain along 4, 5th digits left, along the ulnar portion of hand and ulnar side of arm. Also complains of muscle discomfort along upper trapezius. No orthopedic problem. Fit for duty regarding left arm. No orthopedic return."

During this same period, that is from January 8, 1958 to July 28, 1960, petitioner was employed on various vessels in order to earn his livelihood during the times that he was considered fit for duty. The present action was brought to recover maintenance benefits accruing during those periods when he was considered *not* fit for duty in between trips.

Reasons for Granting the Writ

1. A lower Court of the State of New York has decided a substantial question of federal maritime law, which petitioner contends is not in accord with applicable Federal

Court decisions, destroys the uniformity of maritime law, and is contrary to basic principles of maritime law and justice.

2. The question presented is of obvious importance to all American seamen and has not been directly ruled upon by this Court, although the law in this area should be settled by a decision of this Court.

ARGUMENT

POINT I

Questions concerning a seaman's right to maintenance and cure are within federal jurisdiction and are federal questions.

The Constitution of the United States provides that the Judicial Power of the United States shall extend "to all Cases of admiralty and maritime Jurisdiction". (Article III, § 2).

A seaman's right to maintenance and cure has traditionally been within the maritime jurisdiction of the Federal Courts.

The Courts have sought to keep the maritime law uniform throughout the country and questions concerning this body of law are "Federal Questions", which cannot be affected by State Law or decisions. *Kossick* v. *United Fruit Company*, 365 U. S. 731, 81 S. Ct. 886. *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202.

POINT II

The decision in the instant case is contrary to applicable Federal Court decisions.

The law is well settled that a seaman is entitled to receive maintenance and cure benefits until he has obtained the maximum benefits of medical care and treatment, that is, until no further improvement can be foreseen. *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 58 S. Ct. 651, 82 L. Ed. 993; *Farrell* v. *United States*, 336 U. S. 511, 516-519, 69 S. Ct. 707, 93 L. Ed. 850.

Petitioner is therefore not claiming any maintenance in this action after July 28, 1960, as the record indicates that he was not to return for orthopedic treatment after that date (p. 3 of this Petition). However, it is obvious that on May 2, 1958, he had not as yet attained the maximum benefits to be derived from medical care and treatment, as he was to return to the hospital after one trip (App. p. 7).

The Federal Courts in several cases have answered the question presented in the negative, although the Court in the instant case has in effect answered the question in the affirmative. *Diniero* v. *United States Lines Company*, 185 F. Supp. 818; *Koslusky* v. *United States*, 208 F. 2d 957.

In the recent decision in the case of *Vaughan* v. *Atkinson*, 82 S. Ct. 997 (1962), the Court stated:

> "Admiralty Courts have been liberal in interpreting the duty to pay maintenance and cure for the benefit and protection of seamen who are its wards".

POINT III

The question presented is of substantial importance, meriting consideration by this Court.

The question presented is of obvious importance to all American seamen, as seamen who become ill in the service of the vessel rely on maintenance and cure payments for their sustenance during disability. They receive no Workmens' Compensation.

Petitioner's counsel has been confronted with many situations where seamen, who have been declared fit for duty following a period of disability, have returned to sea, only to find that the disability has re-occurred. They have then been denied maintenance by both the original shipowner, (upon whose vessel the man was injured), and the subsequent shipowner, (whose vessel the man had just left), each shipowner stating that the other is responsible for the maintenance payments.

There are many types of illnesses that are recurrent in nature, and which place seamen in situations similar to that of petitioner.

This Court has not ruled directly on the question presented, and it is respectfully submitted that such ruling would be extremely beneficial to all American seamen.

CONCLUSION

Certiorari in the instant case should be granted, and upon a hearing of the merits, the question presented should be answered in the affirmative.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Abstract From Clinical Record

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

PUBLIC HEALTH SERVICE

Staten Island, N. Y.

Patient was an inpatient of this hospital from Nov. 25, 1957 thru Dec. 31, 1957. Discharged not fit for duty. Advised to continue physical therapy to his back and left arm at the UPHS Outpatient Clinic, 67 Hudson St. and to return to Surgical OPD on Jan. 21, 1958 for re-evaluation.

Diagnosis: Ulnar nerve palsy, left. Lumbo-sacral strain, post traumatic.

Patient returned to clinic on Jan. 10, 21, Feb. 27, March 27, 1958 and was considered not fit for duty.

May 2, 1958: Patient has slight ulnar hyposthesia. Grip moderately strong. Ulnar nerve tender at distal area of transplantation. Believe he should try a trip. Declared fit for duty.

Judgment of Municipal Court

JUDGMENT entered the 7th day of February, 1961. The summons and complaint in this action having been personally served on Hillcone Steamship Co. Inc. through Cosmopolitan Shipping Co. Inc., one of the defendants herein, on the 14th day of April, 1958, and the judgment rendered in favor of defendant against said plaintiff after trial dismissing the complaint on the merits, on the 23rd day of January, 1961.

Now, on motion of Haight, Gardner, Poor & Havens, attorneys for the defendant, it is

ADJUDGED that Hillcone Steamship Co. Inc., defendant, whose principal place of business is located at 311 California Street, San Francisco, California, do recover of Ali Monem, plaintiff, who resides at 294 Atlantic Avenue, Brooklyn, New York, the sum of $151.00 costs and disbursements, and that the defendant have execution therefor. Ten day stay.

ALBERT SULLIVAN,
Clerk.

Order of Affirmance by Appellate Term

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 15th day of June, 1961.

Present:

HON. SAMUEL H. HOFSTADTER, *J. P.*,
" WILLIAM C. HECHT, JR.,
" THOMAS A. AURELIO,
Justices.

Date, June 15, 1961

(Illeg.) 67 H. C.

ALI MONEM,

Plaintiff-Appellant,

vs.

COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO., INC., MARITIME TRANSPORTATION COMPANY, S. A. and MARITIME TRANSPORTATION CO.,

Defendants,

and

HILLCONE STEAMSHIP CO., INC.,

Defendant-Respondent.

An appeal having been taken to this Court by plaintiff from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, entered on the 7th day of February, 1961 and the said appeal hav-

ing been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED, that the judgment so appealed from be and the same is hereby affirmed, with $25 costs.

Enter:

S. H. H.,
Justice, Appellate Term,
Supreme Court, First Department.

Order of Appellate Term Denying Leave to Appeal to Appellate Division

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 27th day of July, 1961.

Present:

HON. SAMUEL H. HOFSTADTER, *J. P.*,
" WILLIAM C. HECHT, JR.,
" THOMAS A. AURELIO,
Justices.

ALI MONEM,
Plaintiff-Appellant,

vs.

COSMOPOLITAN SHIPPING CO., INC., et al.,
Defendant,

and

HILLCONE STEAMSHIP CO., INC.,
Defendant-Respondent.

The above named appellant having by Notice of Motion dated the 28th day of June, 1961, moved for leave to appeal to the Appellate Division, First Department, from the order of this Court dated June 15, 1961 determining the appeal,

Now upon reading and filing said Notice of Motion and the affidavit of Jacob Rassner, verified the 28th day of June, 1961 in favor of said motion and the affidavit of

Order of Appellate Term Denying Leave to Appeal to Appellate Division

Richard C. Maher, verified the 11th day of July, 1961 in opposition thereto,

IT IS ORDERED that said motion be and the same hereby is denied, with $10 costs.

Enter:

Justice, Appellate Term,
Supreme Court, First Department.

Filed, July 27, 1961,
New York Co. Clerk's Office.

Order of Appellate Division Denying Leave to Appeal Thereto

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of October, 1961.

Present :
HON. BERNARD BOTEIN,
Presiding Justice.
" CHARLES D. BREITEL,
" BENJAMIN J. RABIN,
" SAMUEL W. EAGER,
" ROBERT E. NOONAN,
Justices.

ALI MONEM,
Plaintiff-Appellant,

against

COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO., INC., MARITIME TRANSPORTATION COMPANY, S. A., and MARITIME TRANSPORTATION CO.
Defendants-Respondents.

An application having been made by the plaintiff-appellant to the Appellate Division of the First Judicial Department for leave to appeal to the Appellate Division from the determination of the Appellate Term of the Supreme Court in this action entered in the office of said Clerk of the Supreme Court on the 15th day of June, 1961, and the said application having come on to be heard, on reading and

Order of Appellate Division Denying Leave to Appeal Thereto

filing the notice of application herein, dated August 8, 1961, and the affidavit of Jacob Rassner in support of said application, and the affidavit of Richard L. Maher in opposition thereto, and after hearing Mr. Jacob Rassner for the application, and Mr. Richard L. Maher opposed,

It is ordered that said application be and the same hereby is denied with $10 costs.

Enter:

VINCENT A. MASSI,
Clerk.

Order of Appellate Division Denying Leave to Appeal to Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 14th day of December, 1961.

Present :

HON. BERNARD BOTEIN,
Presiding Justice.
" CHARLES D. BREITEL,
" BENJAMIN J. RABIN,
" SAMUEL W. KAGER,
" ROBERT E. NOONAN,
Justices.

ALI MONEM,
Plaintiff-Appellant,

against

COSMOPOLITAN SHIPPING CO., INC., et al.,
Defendants-Respondents.

The above named Plaintiff-Appellant having moved for leave to the Court of Appeals from the order of this Court, entered on the 6th day of September, 1961.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Jacob Rassner in support of said motion, and the affidavit of Richard L. Maher in opposition thereto, and after hearing Mr.

Order of Appellate Division Denying Leave to Appeal to Court of Appeals

Jacob Rassner for the motion, and Mr. Richard L. Maher opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10.00 costs.

Enter

s/ VINCENT A. MASSI,
Clerk.

Order Dismissing Motion for Leave to Appeal

STATE OF NEW YORK,

IN

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of April A. D. 1962.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 301

ALI MONEM,

Appellant,

vs.

COSMOPOLITAN SHIPPING CO. INC., HILLCONE STEAMSHIP CO. INC. and MARITIME TRANSPORTATION COMPANY,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that this Court lacks jurisdiction to entertain it (Civ. Prac. Act, § 589, subd. 1[b]).

A copy.

GEARON KIMBALL,
Deputy Clerk.

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ALI MONEM,

Petitioner,

—against—

COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO. INC. and MARITIME TRANSPORTATION COMPANY,

Respondents.

BRIEF OF RESPONDENTS COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO. INC. AND MARITIME TRANSPORTATION CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. WARD O'NEILL,
Counsel for Respondents, Cosmopolitan Shipping Co., Inc., Hillcone Steamship Co., Inc. and Maritime Transportation Company,
80 Broad Street,
New York 4, New York

RICHARD L. MAHER
On the Brief

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ALI MONEM,
Petitioner,
—*against*—
COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO. INC. and MARITIME TRANSPORTATION COMPANY,
Respondents.

No. 266

BRIEF OF RESPONDENTS COSMOPOLITAN SHIPPING CO., INC., HILLCONE STEAMSHIP CO. INC. AND MARITIME TRANSPORTATION CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

This action was originally commenced in the Municipal Court of the City of New York, Borough of Manhattan, First District, an inferior Court of the State of New York. Appeals from the judgments of that Court are to the Appellate Term of the Supreme Court of the State of New York. Thereafter an application may be made to the Appellate Division of the Supreme Court for leave to appeal to that Court from the determination of Appellate Term. If the Appellate Division denies leave to appeal to it from the determination of the Appellate Term, the Court of Appeals, the Court of last resort in the State of New York, lacks jurisdiction to entertain a motion for leave to appeal to it under Section 589 1(b) of the Civil Practice Act.

Franklin Simon & Company v. *Pease & Elliman*, 262 N. Y. 693;
Allen v. *Hungarian Mothers' Club, Inc.*, 283 N. Y. 698;
Nash v. *Lang*, 300 N. Y. 626;
Baum v. *Crosfield*, 304 N. Y. 732;
Carey v. *Pell, DeVegh & Company, Inc., et al.*, 304 N. Y. 733.
Basil v. *City of New York et al.*, 7 N. Y. 2nd 964;

The petition for certiorari was not filed within ninety days from the entry of judgment of the Appellate Term of the Supreme Court of the State of New York. The Appellate Term is the highest Court of the State of New York in which a decision could be rendered in the instant case. The Appellate Division is the highest court in New York which would have even discretionary jurisdiction. The petition was not filed within the time prescribed from the judgment of the Appellate Term or even from that of the Appellate Division.

The motion made by petitioner for leave to appeal to the Court of Appeals of the State of New York which has no jurisdiction to review the determination of an inferior court does not toll the limitation of time to file the petition for a writ.

Western Union Telegraph Company v. *Hughes*, 203 U. S. 505;
Gypsy Oil Company v. *Leo Bennett Escoe*, 275 U. S. 498;
Department of Banking v. *Pink*, 317 U. S. 264;
Matton Steamboat Co., Inc. et al., v. *Murphy Acting Industrial Commissioner, et al.*, 319 U. S. 412;
Cole v. *Violette*, 319 U. S. 581;

Federal Trade Commission v. *Minneapolis-Honeywell Regulator Company*, 344 U. S. 206.

The petition should be denied on jurisdictional grounds under Title 28 U. S. C. 1257, 2101.

PROCEEDINGS IN THE COURTS BELOW

Petitioner brought his action in the Municipal Court of the City of New York to recover a sum claimed to be due for maintenance in excess of the amount previously paid to him by the owners of the s/s Cornell. The case came on to be heard before a Judge without a jury. The trial was protracted and occupied several days. The Presiding Judge after hearing the conflicting testimony of doctors, who examined petitioner, and examining medical reports of the United States Public Health Service submitted by petitioner as exhibits in support of his claim, found as a fact that petitioner had received the maintenance due him and entered judgment in favor of respondents. Judgment was entered on February 7, 1961.

The Appellate Term of the Supreme Court of the State of New York, First Department, affirmed the aforementioned judgment on June 15, 1961 without opinion.

Thereafter, a motion was made by petitioner in the Appellate Term for leave to appeal to the Appellate Division of the State of New York, First Department. This motion was denied by an order of the Appellate Term entered on July 27, 1961.

Petitioner then made a motion pursuant to Section 623, New York Civil Practice Act in the Appellate Division of the Supreme Court of the State of New York, First Department for leave to appeal to that Court, which motion was denied by an order entered October 24, 1961.

Petitioner then moved in the Appellate Division for leave to appeal to the Court of Appeals of the State of New York which was denied by said Appellate Division by order entered December 14, 1961.

Thereafter, petitioner brought on a motion to the Court of Appeals of the State of New York for leave to appeal to that Court, which motion was denied by the Court of Appeals on the grounds that it lacked jurisdiction to entertain such a motion pursuant to the Civil Practice Act of the State of New York (Civil Practice Act, § 589, Subd. 1[b]).

Petitioner does not here seek relief from the determination of the Court of Appeals of the State of New York and, in so doing must be deemed to concur with the determination of that Court that it lacked jurisdiction to entertain an appeal in this matter commenced in the Municipal Court of the City of New York.

The opening statement in petitioner's brief is that he prays for a writ to review the judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on June 15, 1961. It is evident from this statement that petitioner realizes that the time to petition has expired.

POINT I

PETITIONER DID NOT CLAIM IN THE COURTS BELOW THAT THERE WAS A FEDERAL QUESTION. THERE WAS NO IMPORTANT FEDERAL QUESTION, THERE WAS ONLY A QUESTION OF FACT, THE PETITION DOES NOT WARRANT REVIEW BY THIS COURT.

No Federal issue was raised in the Trial Court. No determination was made by the Appellate Term of the Supreme Court of the State of New York that involved a

Federal question upon its affirmance of the factual determination of the Trial Court.

There has never been any doubt that a seaman may, if the facts warrant, receive maintenance even if he had at one time been declared fit for duty. This is a common occurence and is handled as such by employers and the Courts. The right to maintenance depends on the facts and here the facts were decided against petitioner. There is no conflict between the decision of the Federal and State Courts on the rights of a seaman to obtain maintenance.

In addition to the foregoing it has been held by this Court that if a Federal question is to be argued it must have been presented to the Court below, and the decision of the Federal question must have been necessary to the determination.

Zucht v. *King et al.*, 260 U. S. 174;
Lynch et al. v. *New York*, 293 U. S. 52;
McGoldrick v. *Gulf Oil Corp.*, 309 U. S. 2.
Charleston Federal Savings & Loan Assoc. et al. v. *Alderson*, 324 U. S. 182;
Durey v. *Mayo*, 351 U. S. 277;

As stated earlier there was only a question of medical fact whether or not petitioner was fit for duty. This was resolved against petitioner by the trial court.

CONCLUSION

The Petition Should be Denied.

Respectfully submitted,

J. WARD O'NEILL,
Counsel for Respondents, Cosmopolitan Shipping Co., Inc., Hillcone Steamship Co., Inc. and Maritime Transportation Company,
80 Broad Street,
New York 4, New York.

RICHARD L. MAHER
On the Brief